LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 24 1968
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 399

EDGAR H. SMITH, JR.,
Petitioner,

vs.

HOWARD YEAGER, WARDEN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

GUY W. CALISSI,
Bergen County Prosecutor,
Attorney for and of Counsel with Plaintiff-Respondent, The State of New Jersey,
Court House,
Hackensack, New Jersey.

HAROLD N. SPRINGSTEAD,
Assistant Prosecutor,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
I—Reference to Official Reports of Opinions Delivered in the Court Below	1
II—Counter-Statement Concerning Jurisdiction	1
III—Counter-Questions Presented	2
Introductory Statement	3
Counter-Statement of the Case	3
A. Procedural History	3
B. Petitioner's Involvement and Subsequent Detention	7
C. Post-Indictment Interview	11
Argument:	
Point I—The doctrine of Massiah v. United States, assuming arguendo its application to a 1957 trial, should not invalidate petitioner's conviction	12
Point II—Assuming arguendo the factual applicability of Massiah v. United States, that doctrine should not be applied retroactively to a 1957 conviction	15
Point III—Voluntariness of petitioner's statement was determined in the trial court and an adequate record was presented for both State and Federal court review	18

PAGE

Point IV—The issue of voluntariness has been properly decided in both State and Federal courts and this Court should again refuse review of the issue 20

CONCLUSION 28

Cases Cited

Columbe v. Connecticut, 367 U. S. 568 (1961) 25

Davis v. North Carolina, 384 U. S. 737 (1966) 26, 27

Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 977 (1964) 7, 15

Gallegos v. Colorado, 370 U. S. 49 (1962) 25

Gideon v. Wainwright, 372 U. S. 335 (1963) 17

Greenwald v. Wisconsin, 390 U. S. 519 (1968) 27

Haley v. Ohio, 332 U. S. 596 (1948) 24, 25

Johnson v. State of New Jersey, 384 U. S. 719 (1966) 7, 18

Linkletter v. Walker, 381 U. S. 618 (1965) 17, 18

Lyles v. Beto, 363 F. 2d 503 (5th Cir. 1966) 16

Mapp v. Ohio, 367 U. S. 643 (1961) 17

Massiah v. United States, 377 U. S. 201 (1964) .2, 7, 12, 15-18

McLeod v. Ohio, 381 U. S. 356 (1965) 15

Romano v. Fay, 360 F. 2d 389 (Cir. Ct. 1966) 15

Smith v. New Jersey, 361 U. S. 861 (1959) 4

Smith v. New Jersey, 376 U. S. 928 (1964) 5

Smith v. New Jersey, 379 U. S. 1005 (1965) 6

Smith v. New Jersey, 380 U. S. 938 (1965) 6

PAGE

Spano v. New York, 60 U. S. 315 (1965) 24

State v. Bindhammer, 44 N. J. 372, 209 A. 2d 124 (1965) 13, 14

State v. Cleveland, 6 N. J. 316, 78 A. 2d 560 (1951) ... 13

State v. Rios, 17 N. J. 572, 112 A. 2d 247 (1955) 13

State v. Smith, 27 N. J. 433, 142 A. 2d 890 (1958) 3, 4

State v. Smith, 29 N. J. 561, 150 A. 2d 769 (1959) 3, 4

State v. Smith, 43 N. J. 67, 202 A. 2d 696 (1964) 6

Townsend v. Sain, 372 U. S. 293 (1963) 18

United States ex rel. Smith v. New Jersey, 201 F. Supp. 272 (D. C. N. J. 1962) 4

United States ex rel. Smith v. New Jersey, 322 F. 2d 810 (3rd Cir. 1963) 5, 22, 24

Rule Cited

New Jersey Criminal Practice Rule 3:10A-1 6

Other Authorities Cited

Annotation:

Admissibility of Confession, 23 A. L. R. 2d 919, 924 (1952) 13

II Defender Newsletter No. 5 (1965) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 399

EDGAR H. SMITH, JR.,

Petitioner,

vs.

HOWARD YEAGER, WARDEN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

I

Reference to Official Reports of Opinions Delivered in the Court Below

The petitioner's reference to the opinions below is correct.

II

Counter-Statement Concerning Jurisdiction

It is submitted that the decison of the United States Court of Appeals, entered on January 2, 1968, (P25a) was

in no way repugnant to the Constitution of the United States and the Court did not decide any Federal issue or question not heretofore determined by this Court or in any way contrary to the applicable decisions of this Court.

III

Counter-Questions Presented

1. Whether a post-indictment explanation by a defendant who has retained counsel that his stenographic statement was "accurate" constitutes a violation of *Massiah v. United States*, 377 U. S. 201 (1964) (assuming *arguendo* it is to be applied retroactively) where the stenographic statement could have been introduced into evidence regardless of the defendant's description of "accuracy"?

2. Whether the *Massiah* doctrine, assuming its applicability in the instant case, is to be given retrospective application to a 1957 decision where the guilt determining process was in no way affected by the alleged "admission"?

3. Whether a hearing in the Federal Courts is required on the voluntariness of a 1957 "confession" when a full hearing was held by the trial judge and retained counsel expressly rejected the opportunity for a hearing in the United States District Court?

4. Whether this Court should grant review to consider the voluntariness of a "confession" where the precise issue has been decided on numerous occasions in both State and Federal Courts and this Court has declined to hear the issue three times in the past?

Introductory Statement

Prior to stating his case, petitioner conveniently *introduces* his legal arguments by a claim that "substantial doubts have been raised as to his guilt." (Pb3). Authority for this pronouncement is based upon a magazine article which is reproduced in his appendix (P27a to P63a).

In reply to this reference of "serious public doubt", respondent asks this Court to note well the words of the New Jersey Supreme Court in their second review of the case:

> "We have re-examined the original record, as well as the earlier opinion, and find no basis whatever for withdrawing from or qualifying our determination that the evidence was devastatingly convincing of the defendant's guilt." *State* v. *Smith*, 29 N. J. 561, 575, 150 A. 2d 769 (1959).

It is respectfully submitted that a magazine article based upon self-serving inaccuracies and untruths can in no way be substituted for what occurred at trial.

Counter-Statement of the Case

A. Procedural History

Petitioner is presently incarcerated under a Death sentence imposed after his conviction for first degree murder on May 28, 1967 (T. 977-25 to 30).* His conviction was affirmed on direct appeal to the New Jersey Supreme Court on June 25, 1958. *State* v. *Smith*, 27 N. J. 433, 142 A. 2d 890 (1958). Among the numerous trial errors considered in that appeal, the court considered the propriety of the admission of petitioner's written statement into

---

* T.—(refers to trial transcript).

evidence.* *id.* 27 N. J. at 449-460, 142 A. 2d at 898-950. The court in disposing of the admissibility issue considered the written statement "as though its introduction had been opposed upon every conceivable legal ground." *id* at 458, 142 A. 2d at 904. Concluding that there was no error in the admission of the written statement, the court upheld that trial judge who found it to be a confession which had been voluntarily given (T. 545-1 to 10). This conclusion was reached after holding an evidentiary hearing which several witnesses, including the petitioner, testified. However, petitioner's retained counsel while conceding that the statement was voluntary (T. 532-30 to 35; T. 535-26) objected to the admission of the document on the grounds that it was not really a confession (T. 545-25 to T. 546-18).

Petitioner then moved for a new trial chiefly on the grounds of newly discovered evidence. The trial court's denial was affirmed by the New Jersey Supreme Court on May 4, 1959. *State* v. *Smith*, 29 N. J. 561, 150 A. 2d 769 (1959). The United States Supreme Court denied *certiorari* on October 19, 1959. *Smith* v. *New Jersey*, 361 U. S. 861 (1959). The points presented to the court at that time were: (1) the confession was involuntary; (2) defendant was not given a fair and impartial trial; (3) defendant was inadequately represented by counsel; (4) the trial court did not properly charge all degrees of homicide and, in particular, manslaughter; (5) defendant was not present at the hearing on the motion for a new trial. See, *United States ex rel. Smith* v. *New Jersey*, 201 F. Supp. 272, 274 (D. C. N. J. 1962). Petitioner next sought *habeas corpus*

---

* At trial, petitioner's attorney considered it a statement and not confession (T.525-526). In his present brief, petitioner refers to the statement as a "Q. and A."; respondent elects to use the terms "written statement" and "stenographic statement" interchangeably.

relief in the Federal District Court alleging numerous trial errors. *id.* at 272. At the hearing before District Judge Lane, petitioner was represented by his trial counsel, John E. Selser and William Richter of the New York, both of whom were retained (A121a).* Since most of the points raised had not been considered by the New Jersey Courts, the United States District Court only considered those previously determined under State procedure. *id.* at 275-276. Judge Lane concluded, *inter alia,* that petitioner's confession was given voluntarily. *id.* at 281.

United States Court of Appeals for the Third Circuit affirmed the District Court's denial of the Petition for *habeas corpus* on July 24, 1963. *United States ex rel. Smith* v. *New Jersey,* 322 F. 2d 810 (3rd Cir. 1963) (One judge dissenting). That Court again concluded that the confession was made voluntarily. *id.* at 816-817. The petition for rehearing before the Court, *en banc,* was denied in a five to two decision on September 9, 1963. *Certiorari* was again denied by the United States Supreme Court on February 17, 1964, *Smith* v. *New Jersey,* 376 U. S. 928 (1964) (Justice Douglas voted to grant *certiorari*).**

---

* A-a (refers to petitioner's appendix submitted to the United States Court of Appeals for the Third Circuit).

** The issues presented to the court at that time were:

> "(1) Whether the Petitioner's rights under the Fourteenth Amendment of the United States Constitution have been violated by the admission into evidence in a State prosecution of a capital case of a confession obtained from him before he had been arraigned, after a thirteen hour and twenty minute period of prolonged, massive incommunicado interrogation, after the police had obtained more

(*Footnote continued on following page*)

Petitioner then sought Post-Conviction Relief under New Jersey Criminal Practice Rule 3:10 A-1 *et seq.* raising the issues not considered by the United States District Court as well as additional ones supplied by himself and counsel. The trial court's denial was again affirmed by the New Jersey Supreme Court on July 7, 1964, *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 696 (1964).

The petition for *certiorari* was again denied by the United States Supreme Court on February 1, 1965. *Smith* v. *New Jersey*, 379 U. S. 1005 (1965) as was his petition for rehearing on March 8, 1965. *Smith* v. *New Jersey*, 380 U. S. 938 (1965). Another petition for relief was de-

---

(*Footnote continued from preceding page*)

than sufficient evidence to charge him with murder and without advising him of his right to counsel and right to remain silent; (2) Whether the admission into evidence of Petitioner's confession violated his rights under the Sixth and Fourteenth Amendments of the United States Constitution where his verbal acknowledgement of the accuracy of the confession, which was all that was necessary under New Jersey to qualify it, was obtained by the police, while Petitioner was in jail and in the absence of his counsel, after Petitioner had been arraigned and indicted and after he had advised the police that his attorney had told him not to sign the confession; (3) Whether, in view of the silence of the record of Petitioner's trial as to material and essential elements of his detention and the failure of the trial court to inquire as to these elements, the United States District Court should have held a plenary hearing with regard to these circumstances before determining Petitioner's application for a writ of *habeas corpus*; (4) Whether the failure of the State trial court to hold a full preliminary hearing prior to ruling on the voluntary nature of Petitioner's confession was a violation of Petitioner's rights under the Fourteenth Amendment of the United States Constitution."

nied by the trial court on March 29, 1965; the New Jersey Supreme Court denied leave to appeal on April 13, 1965 and denied a petition for reconsideration on June 22, 1965.

Petitioner filed again for *habeas corpus* relief in the United States District Court on July 7, 1965 (A3a to A27a) raising numerous points including that the "holdings of *Escobedo, Massiah* and *Russo* must be given retroactive application." Subsequent to this Court's decision in *Johnson* v. *State of New Jersey,* 384 U. S. 719 (1966) the District Court denied retroactive aplication to any of the doctrines advanced. After a denial of application for reconsideration petitioner appealed to the United States court of appeals which affirmed on May 4, 1967 (one judge dissenting) (P1a). The petition for rehearing was denied on March 15, 1968 (one judge dissenting) (P21a).

Petitioner seeks review by this Court in his fourth petition for certiorari.

B. Petitioner's Involvement and Subsequent Detention

A fifteen year old Ramsey, New Jersey, school girl, Victoria Zielinski, was found brutally murdered in Mahwah (an adjoining town) on the morning of March 5, 1957 (T. 244-37 to T. 245-26).*

---

* The Medical Examiner testified that the girl's body showed a "total loss of brain" and "her left eye was totally destroyed and all that was left of it was the sack, collapsed in the orbit of the eye's pocket." Her "lower jaw and upper jaw had multiple fractures. Her teeth, most of them were loose in her mouth and those that were left were just hanging from the gums and there was blood of course, from the nose, which was fractured in two or three places, and bleeding from the mouth . . . She had four or five distinct small bruises, lentil size, bluish in color, around her right nipple in the areola area . . . and it appeared to this examiner as being bites, teeth bites." (T. 511-21 to 38).

During the evening of March 5, 1967 one of the petitioner's friends, Joseph Gilroy, told the Ramsey Police that he had found suspicious stains on the seat and floor of his car which he had lent to petitioner the previous evening (T. 383-10 to 34).

After inspecting Gilroy's car at about 10:45 P.M. that evening, Detective Graber and Investigator Garabedian from the Bergen County Prosecutor's Office, along with Gilroy (T. 496-4) went to petitioner's mother-in-law's home in Ridgewood (T. 419-34). At about 11:30 P.M. they picked up petitioner there and brought him to police headquarters in Mahwah (T. 419-33 to T. 420-15). Present at headquarters were Prosecutor Calissi, Assistant Prosecutor Galda, Captain DeMarco, Chief Smith of Mahwah and numerous newspaper reporters (T. 420-16 to 21).

During the general questioning—chiefly by Assistant Prosecutor Galda--Captain DeMarco noticed that petitioner's left hand was lacerated (T. 476-21 to 26). Smith stated that he hurt it while repairing a tail pipe (T. 476-28 to 30). Examination of petitioner's knees revealed lacerations, contusions and scratches (T. 476-31 to 38) which he explained had happened when he fell out of the car after becoming ill the previous night (T. 476-38 to T. 477-7). Petitioner stated that he had vomited over his pants and shoes which he was wearing (T. 424-25); that he had thrown them away and would show the officer where they were (T. 477-8 to 18). Petitioner accompanied Galda and three police officers to a place in Ramsey where he pointed out a garbage can where he had thrown away his shoes (T. 420-25; T. 477-20 to 30). After retrieving the shoes (later found to be stained with blood), the group drove to the sand pit where petitioner pointed out the area where he said he vomited (T. 423; T. 478). A large light

was used by the police during the search, but nothing was developed (T. 423; T. 478). From there the group went to petitioner's trailer to obtain some clothing he had worn the night before (T. 423-35). While at the trailer, petitioner stated that the jacket he had worn the night before was at his mother-in-law's home in Ridgewood (T. 423-36 to 40) and had been recently washed (T. 424-3). They then drove to the place where petitioner said he had thrown his pants after being sick on them (T. 424-23 to 37; T. 480-10 to 21). They searched the area until about 3:00 A.M. without success (T. 434-14). On the return trip to Mahwah, they searched another area where petitioner said he had first been sick—again without success (T. 425-13 to 20).

After arriving at Mahwah Police Headquarters about 3:30 A.M. a detective went to Ridgewood to pick up petitioner's jacket (T. 425-25; T. 496-36). At headquarters there was further conversation with regard to the clothing petitioner wore on the previous night (T. 480) and there was some discussion as to the possibility of again looking for the pants (T. 481). At this time petitioner was seated in the back of the room with Gilroy and another person (T. 481-30; T. 482-16). Petitioner then advised the officers that he could explain about any blood which might be found on his shoes retrieved previously (T. 481-32 to T. 482-11). Coffee and buns were brought in for everyone including petitioner, the police and some of the other fellows also being questioned (T. 482-12 to 17).

Between 3:00 A.M. and 3:45 A.M. the officers and petitioner again went out to look for the place he vomited and where he threw his pants (T. 497-14 to 19). Petitioner assisted in the search by pointing out the area where he allegedly had thrown up (T. 280 to T. 281; T. 497-20 to 28)

and where he threw his pants (T. 281-14 to 20; T. 497-40 to T. 498-10), again without success. The group then returned to headquarters, arriving there "quite late" (T. 498-33).

Around 5:00 A.M. arrangements were made to have petitioner examined by Dr. Gilady with respect to his knee injuries (T. 482-18). Accordingly, the examination was scheduled between 7:30 A.M. to 8:00 A.M. (T. 482-24). Petitioner, Detective Sinatra and Captain DeMarco then drove to the latter's home (T. 482-32). There Captain DeMarco gave Detective Sinatra some money with the instructions that he and petitioner have some breakfast prior to the visit to Dr. Gilady's office (T. 482-33 to 37). Petitioner testified that he ate two eggs and a cup of coffee (T. 452). After breakfast petitioner and Detective Sinatra returned to Captain DeMarco's home and the three drove to Dr. Gilady's office (T. 482-40); the examination was conducted at 7:55 A.M. (T. 510-12). The doctor found petitioner alert and in normal health (T. 510-37 to 40); his pulse and respiration were normal (T. 511-3).

After the examination the three went to the Prosecutor's Office (T. 483-33 to 39). There, Captain DeMarco called a photographer to take pictures of petitioner's knees and hand (T. 484-3 to 8). About this time the Prosecutor's office was informed that the pants had been found, stained with blood, as were a pair of socks in the pocket (T. 499-14; T. 601-22; T. 502-15). Fingernail scrapings and a hair sample were then taken from petitioner (T. 485-5).

After pictures of petitioner were taken, Detectives deLisle and Spahr questioned him at about 10:00 A.M. as to his activities on the night of the murder (T. 519-9 to 12). Detective deLisle asked petitioner, "What did the girl do

to you?" and he responded, "She hit me." (T. 519-20 to 22). He then asked petitioner, "Where did she hit you?" and he answered, "In the face." (T. 519-23). Thereupon, petitioner started crying (T. 519-24). He asked for a drink of water and a cigarette, which were given to him (T. 519-25 to 27). Petitioner then asked to speak to a certain priest that he knew in Don Bosco High School (T. 519-29 to 30); the priest was called (T. 485-14).

Prior to the arrival of the priest and after petitioner was more composed, he told the detectives of his meeting with Victoria Zielinski (T. 518-30). About forty-five minutes later the priest arrived (T. 520-4 to 10) and conferred with petitioner for approximately a half hour (T. 751-33). Petitioner then gave the Prosecutor a full statement, stenographically recorded under oath (T. 527-29 to 35). The statement commenced at 12:50 P.M. on March 6th (T. 551-33) and was continued at the vicinity of the crime (T. 531-26 to 30). The statement was concluded at 3:45 P.M. and covered thirty-nine pages (T. 393-20). Petitioner was then brought to Mahwah for arraignment (T. 489-26), arriving there at 4:05 P.M. (T. 593-22); he was arraigned at about 7:00 P.M. that evening.

C. Post-Indictment Interview

After the written statement given by petitioner had been prepared in stenographic form, Detective deLisle visited petitioner in the Bergen County Jail on March 11, 1957, for the purpose of having him read and sign it (T. 521-7). At this time, petitioner was under indictment and had retained counsel. After reading the statement for about 35 minutes, the petitioner refused to sign it on the advice of his lawyer (T. 521-10). Detective deLisle then asked petitioner if the statement was accurate and petitioner said, "yes, it was accurate". (T. 521-17)

In addition, petitioner "commented on how accurate it was and it was amazing that the court stenographer could take down with such accuracy such a statement." (T. 521-18 to 20)

It is this conversation which petitioner now claims violates *Massiah* v. *United States,* 377 U. S. 201 (1964). It is respondent's position that the Massiah doctrine has not been violated even by today's standards, that no prejudice accrued to the petitioner, and that in no event should the Massiah doctrine be given retroactive application.

ARGUMENT

POINT I

The doctrine of *Massiah* v. *United States,* assuming *arguendo* its application to a 1957 trial, should not invalidate petitioner's conviction.

Petitioner seeks to apply the doctrine of *Massiah* v. *United States,* 377 U. S. 201 (1964) to his conversation to a Prosecutor's detective (Pb12). Subsequent to the indictment of petitioner and retention of counsel, Detective deLisle visited him in the Bergen County Jail for the purpose of having him read and sign his written statement which had just been typed from the stenographic notes (T. 521-7).

Petitioner read the statement for about thirty-five minutes but refused to sign it on the advice of his lawyer (T. 521-17). As noted above, he admitted that the statement was accurate and commented that "it was amazing that the court stenographer could take down with such

accuracy such a statement." (T. 521-15) This comment as to accuracy was neither an admission of guilt nor was it a representation as to the truthfulness of the written statement. Petitioner merely stated in effect that the stenographer had accurately recorded what was in fact said.* Petitioner argues that the statement would never have been admitted into evidence at trial except for this admission of accuracy, citing *State* v. *Cleveland,* 6 N. J. 316, 327-30, 78 A. 2d 560 (1951). It is submitted that regardless of the "accuracy" comment by petitioner, the written statement would have been admissible in New Jersey in 1957 just as it would be in 1968. See *Anno.: Admissibility of Confession,* 23 A. L. R. 2d 919, 924 (1952).

In *State* v. *Bindhammer,* 44 N. J. 372, 209 A. 2d 124 (1965) the State offered a transcript of the defendant's statement at trial. Since it had not been read and signed by the defendant at the time of its taking, the trial court decided it should not be admitted into evidence based upon the holding in *State* v. *Cleveland, supra.* However, the court permitted the reporter who had transcribed the confession to testify orally from his shorthand notes in accordance with *State* v. *Rios,* 17 N. J. 572, 112 A. 2d 247 (1955). On appeal, Bindhammer claimed that the reporter "should have been compelled to testify merely from his memory and should have been permitted to refer to his shorthand notes (or his transcript thereof) only to the extent necessary to refresh his present recollection." 44 N. J. at 385.

---

* Petitioner testified at trial that he never made any reference to the accuracy of his written statement to Detective deLisle (T. 675-5). However, his affidavit of March 22, 1965 stated, "I did make some representations as to the 'confession's accuracy' " (A50a).

The Court in rejecting the contention advised:

> "Documents may, of course, freely be referred to for the purpose of refreshing or reviving present recollection. See *Zimmer* v. *Westinghouse Electric Corp.*, 26 N. J. 339, 350-351 (1958). Where the recollection was recorded at the time of the event, or when it was fairly fresh in mind (McCormick, Evidence, § 277, at p. 591 (1954) its record will generally be more accurate and trustworthy than present recollection of "greater or less vividness." 3 *Wigmore, Evidence,* § 738, at p. 76 (3d ed. 1940). If the circumstances are appropriate, the *record may become a competent witness within the evidential doctrine referred to as 'past recollection recorded,' a doctrine long recognized in our State as well as elsewhere.* See *Kazanjian* v. *Atlas Novelty Co.*, 34 N. J. Super. 362, 369-372 (App. Div. 1955)." (Emphasis added.) 44 N. J. at 385-386, 209 A. 2d at 131.

Thus, the New Jersey Supreme Court has clearly announced what the law is with regard to receiving documents in evidence on the basis of "past recollection recorded". Therefore, regardless of petitioner's "admission of accuracy", his written statement could have been admitted at trial in 1957.

In addition, the "admission of accuracy" did not constitute a representation that his statement was truthful. Therefore, no prejudice could have accrued to the petitioner at trial.

POINT II

Assuming *arguendo* the factual applicability of *Massiah* v. *United States*, that doctrine should not be applied retroactively to a 1957 conviction.

Assuming, *arguendo*, that the actions of Detective de-Lisle in bringing petitioner's statement to him after the indictment and retention of counsel would in some way be violative of the *Massiah* doctrine, there is no reason for this Court to set aside petitioner's 1957 conviction.

Petitioner's theory that *Massiah* should be given retroactive application is based principally upon *McLeod* v. *Ohio*, 381 U. S. 356 (1965). That case, however, was a direct appeal and not a collateral attack upon a 1957 conviction. It is submitted that the proper disposition of the issue was accorded in *Romano* v. *Fay*, 360 F. 2d 389 (Cir. 1966). In that case, the precise issue was whether the use of post-indictment statements made to a police officer required reversal of his 1953 conviction, and the Court properly held:

> ". . . the only infirmity in Romano's questioning and subsequent trial was an inconsistency with two Supreme Court decisions handed down more than ten years later, *Massiah* v. *United States*, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and *Escobedo* v. *State of Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 977 (1964), and that those decisions should not be retrospectively applied to void Romano's conviction." 360 F. 2d at 391.

The Court considered the underlying reasons for the *Escobedo* and *Massiah* doctrines stating:

> "In our opinion, the most important factor in our decision is an assessment of the purposes of

> the *Escobedo* and *Massiah* doctrines and the effect of retroactive application upon the achievement of those purposes. In assessing the 'complex of values' underlying these decisions, the inquiry must be focused on whether the new doctrine was aimed at correcting influences that 'infect a criminal proceeding with the clear danger of convicting the innocent.' *Tehan* v. *United States ex rel. Shott,* 383 U. S. 406, 86 S. Ct. 459." *id.* at 394.

The Court distinguished the evils inherent in the use of coerced confessions from *Massiah*:

> "But these same dangers are not present when the defendant is questioned by the police. To be sure, the defendant is often at a tactical disadvantage in the 'battle of wits' between a skilled interrogator and one who attempts to obscure or conceal his guilt. But the confessions or admissions that are obtained through normal and noncoercive police questioning are not unreliable and the search for truth is not hampered by their admission during a trial at which the defendant is represented by counsel. Thus, we find the Sixth Amendment arguments for retroactive application of the *Massiah* and *Escobedo* far weaker than the arguments which led us to apply *Gideon* retroactively." *id.* at 395.

In considering the retroactive application of *Massiah* to a 1961 conviction, the Court of Appeals in *Lyles* v. *Beto,* 363 F. 2d 503 (5th Cir. 1966) advised:

> "We have reconsidered this case in light of *Massiah* and in light of *Malloy* v. *Hogan,* 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653. We conclude that

the opinion of the Supreme Court in *Johnson and Cassidy, Petitioners* v. *State of New Jersey,* 1966, 834 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882, rules this case. The trial in this case began long before June 13, 1966, the cut off date now announced by the Supreme Court for the application of the requirement of *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694." *id.* at 503-504.

It is submitted that the same reasons for denying retroactivity to the exclusionary rule announced in *Mapp* v. *Ohio,* 367 U. S. 643 (1961) by *Linkletter* v. *Walker,* 381 U. S. 618 (1965) should apply to the *Massiah* doctrine as well. In *Linkletter,* this Court advised:

". . . there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. *To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice. id.* 381 U. S. at 637, 638. (emphasis added.)"

This Court further noted in cases where the decisions applied retrospectively (*e.g. Gideon* v. *Wainwright,* 372 U. S. 335 (1963)) that:

". . . in each of the three areas in which we have applied our rule retrospectively the principle that

> we applied went to the fairness of the trial—the very integrity of the fact-finding process." *Linkletter* v. *Walker, supra,* 381 U. S. at 639.

It is submitted that the guilt determining process was in no way affected in the instant case and therefore retroactive affect to the *Massiah* doctrine should be denied. See *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

POINT III

Voluntariness of petitioner's statement was determined in the trial court and an adequate record was presented for both State and Federal court review.

Petitioner's retained counsel conceded at trial that his statement given to the officials of the Bergen County Prosecutor's Office was voluntary (T. 532-30 to 35; T. 535-36). However, since he objected to its introduction into evidence on other grounds, the trial court took testimony on the issue of voluntariness (T. 537-27). Petitioner now seeks a hearing based upon *Townsend* v. *Sain,* 372 U. S. 293 (1963) (Pb18) to question the voluntariness of his statement after relying upon the record developed by the trial court. On May 15, 1961, District Court Judge Lane asked petitioner's retained counsel if the record, which was before him for the first time, was deficient in any respect.

> ". . . I think I initiated the idea that I didn't want counsel on the side of the defendant or the side of the State or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record insofar as you gentlemen are concerned to be as complete as you thought it should

> be. . . . I am not talking about the merits. I just wanted everybody to be satisfied that they had, so far as they were concerned, the record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet." (A122a to A123a)

Petitioner's retained counsel rejected the offer of Judge Lane and argued the issue of voluntariness based upon the record (A129a to A149a). In fact, counsel stated that:

> "The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind the case. *I don't think it is necessary here.*
>
> *"I think if your Honor limits himself to the record. . . ."* (A130a) (Emphasis added.)

Petitioner claims that despite the above that he did not waive his right to a hearing and cannot be bound by the actions of his counsel because it was not his considered choice (Pb23). It should be noted that a hearing is discretionary and that petitioner has no inherent right to a plenary evidentiary hearing. Here he retained competent counsel to represent him and must be bound by their actions. Could petitioner insist on being present at any and all oral arguments of his numerous appeals? Should he not be bound by this very petition which is submitted to this Court? It is submitted that any such notion that he must expressly waive any legal points or arguments which he feels should be submitted to a court after an adverse decision would be an impossible imposition upon orderly legal process in the United States.

It is submitted that a full hearing on the voluntariness of petitioner's statement was afforded to him in the trial court, rejected in the Federal District Court, and should be denied to him by this Court.

POINT IV

The issue of voluntariness has been properly decided in both State and Federal courts and this Court should again refuse review of the issue.

The issue of voluntariness of petitioner's written statement has been justly and fairly determined in both Federal and State Courts. Indeed, this Court has refused to review the issue three times previously. Petitioner raises the issue in two areas of his petition. The first is in his "statement of the case" where, unencumbered by references to the record, he claims that "through the night and morning, there followed more than thirteen hours of interrogation and other police strategies designed to elicit the Q. and A. statement." (Pb4-5). The facts show that petitioner was first interviewed at 11:30 p.m. on March 5th (T. 419-420) and at about 10 a.m. on the morning of March 6th admitted hitting the victim (T. 519). At that time he started crying (T. 519-24) and asked to speak to a priest he knew from Don Bosco High School. Thus, some 10½ hours after the first interview with petitioner a priest was summoned at his request. Was his one-half hour conference with his priest (T. 751-33), one of the "police strategies designed to obtain the Q. and A. statement"?

Petitioner in a modified version of a chart prepared by the *Defender Newsletter,* Vol. II, No. 5 (1965) seeks to fall within the ambit of those cases by showing similarities. It is submitted that the facts shown by the record and petitioner's use of the chart are irreconcilable.

Contrary to this picture of "involuntariness" related by petitioner, the record shows that he (1) was alert and had sufficient rest; (2) had sufficient food; (3) wasn't continually questioned or harassed; (4) that no promise or threats were made to him by the police or prosecutors.

Initially it should be noted that when petitioner committed the crime he was 23 years old, had a wife and daughter, and was formerly a member of the United States Marines (T. 775-T. 776). The first time the matter was before the United States Court of Appeals that Court considered the contention that petitioner suffered from a lack of sleep.

> "The night of the murder, he was in bed by 10:00 P.M. He listened to four rounds of the Gil Turner-Ruby Given prize fight. He said, 'I laid in bed listening to Gil Turner knock him out in the fourth round and went to sleep.' A round is of three minutes duration with one minute rest intervals. Three rounds and part of a fourth would not total fifteen minutes. The fight would take a few minutes to get under way. Reasonably it was over before 10:30 P.M. He got out of bed the next morning '* * * about 8:30.' So he had apparently an excellent night's rest. The next evening he was in bed by seven o'clock. He rose a half hour later and took his wife and baby to his mother-in-law's. He went to bed there and was in bed for two hours before the police woke him at 11:30 P.M. From that time through his arraignment there is nothing to indicate in Smith any condition of exhaustion or fatigue." 322 F. 2d at 813.

In addition, there was testimony that petitioner was "all right in every way" (T. 543-37); "in good shape"; "his mind seemed to be clear", and "he seemed to be wide awake." (T. 517-5 to 7).

As to petitioner's claim of having insufficient food* the Court of Appeals concluded:

> "Somewhere around 3:00 A.M. when clearly for the first time anyone concerned was having something to eat and drink, i.e., buns and coffee, Smith was included. He had more coffee after that. And about 7:30 that morning or earlier he had his breakfast. . . . It is not contradicted that before starting his statement Smith was asked if he wanted '* * * some coffee or anything?' He asked for coffee and the answer was 'Surely'; that when he was more than half way through his statement he was asked 'Would you like some more coffee or *anything?*' (Emphasis supplied), which offer he did not accept; that a little while after that he was again asked 'would you like some coffee and rest for a few minutes—*something to eat?*' (Emphasis supplied) The offer of coffee and food was not accepted but that of a rest was and a short recess was taken. Right after the arraignment, Smith went to restaurant with the Prosecutor where they had something to eat. Smith said 'After I ate I felt fine'." 322 F. 2d at 814.

Petitioner's contention that he was interrogated in relays of police officials during the 13 hour period prior to

---

* Petitioner claims that during a 35 hour period he had only two eggs and cups of coffee. At trial he stated: "The only thing I had eaten for a period of, I would say, almost twenty-four hours was two eggs, a cup of coffee in the diner and a container of coffee in Mahwah and another container in the Prosecutor's Office." (T542-6 to 11). Compare this with his affidavit (A100a-11) and brief in the Court of Appeals (Ab11; Ab12). See also statement by counsel (T489-37).

giving his statement (Pb5) is without foundation in the record. He admitted that Mr. Galda questioned him at about midnight and then "on and off, not continually." (T. 540-34). Most of the time was spent not in questioning petitioner but in searching for his shoes and pants and the places he supposedly vomited (T. 541-20); waiting with others who were being questioned (T. 481-30; T. 482-16); eating (T. 482-12 to 17; T. 482-33 to 37); being examined by Dr. Gilady (T. 510-40); having pictures taken of his knees and hand (T. 484-3 to 8); and speaking to a priest that he requested (T. 751-18 to 30).

Petitioner's other complaint, made at the hearing on the voluntariness of his confession was that he "had been cold all night". (T. 542-7). Presumably this reference is to the two to three hour period which he stated was the total time that he spent outdoors (T. 541-17 to 22). The Court of Appeals, in reviewing the record supporting the contention, advised:

> "Some mention is made of Smith not having an outside jacket on while he was going with the police to the various places connected with his story. He was out of doors altogether at most two or three hours. The longest he was out at one time was an hour. He wore a red woolen shirt. He had an undershirt on, for later he took it off and it was marked for identification. At one stage outdoors he mentioned it was quite cold and Mr. Galda gave him his overcoat which he wore from one-half to three-quarters of an hour. The next morning, before he was taken to breakfast and to the doctor's, because he was cold, he was allowed to move into the front seat of the automobile in which he rode, as he says '* * * so that he (Detective Sinatra) could turn the heater on for me * * *.' There

> is evidence indicating that the weather the night of March 5th was only two degrees colder than that of the night of March 4th. And while there is testimony that he had worn a blue jacket on the 4th, Smith also definitely said that all he had on that night was a shirt." 322 F. 2d at 814.

The Court then noted the following questions and answers during petitioner's cross-examination when he described the clothing Hommel was wearing the night of the murder:

> "Q. Well, it was pretty cold that night? A. It was.
>
> "Q. And all he had on was a shirt? A. *That is all that I had on.*"
>
> * * *
>
> "Q. Just a shirt? And it was a cold night though, wasn't it? A. *I didn't think it was too cold.*" (T. 783-32 to 40) (Emphasis added.)

Such cases as *Haley* v. *Ohio,* 332 U. S. 596 (1948), and *Spano* v. *New York,* 60 U. S. 315 (1965), are clearly distinguishable on their facts. In *Haley* the defendant was a 15-year old boy who was questioned in relays of police from midnight until 5:00 A.M. The certain coercive effect of that much interrogation at night upon a 15-year old boy, who would be more susceptible to pressures than an adult, was held sufficient to make his confession involuntary. In *Spano,* the subject had a history of emotional instability and was "grilled" for more than 8 hours. In holding the confession was not voluntary, the Court emphasized the inevitable effect of fatigue and the psychological coercion from a police friend of his who falsely played upon his sympathies.

Certainly, there can be no claim that petitioner was a child as in *Gallegos* v. *Colorado,* 370 U. S. 49 (1962), and *Haley* v. *Ohio, supra,* or an adult with the mental age of a child as in *Columbe* v. *Connecticut,* 367 U. S. 568 (1961). Quite the opposite is true—petitioner was a 23 year old former Marine; married and quite intelligent. The only person he ever requested to see was a priest who was called and spent a considerable time with him. He was never denied counsel and never even handcuffed (T. 774-19 to 28).

Petitioner's "confession" itself shows the voluntary nature in which it was given. He was introduced to those present (T. 1073-11) and was asked if he would give a voluntary statement under oath (T. 1073-15 to 30); he was asked if he cared for "coffee or anything" (T. 1073-28). The questioning was mostly in the narration form and at the outset he asked:

> "A. . . . Can I ask a question here?
>
> Q. Surely. A. Like I explained to you before I am a little fuzzy on this. As I go along, can I add on—
>
> Q. Certainly, just as you know the incident as it actually occurred—and you can interrupt at any time you want. A. That's what I want to do—interrupt." (T. 1073-36)

During the questioning, no pressure was exerted upon him. (See T. 1079-12; T. 1088-8; T. 1089-8; T. 1092-25; T. 1097-13) and a recess was taken when he asked to go to the men's room (T. 1086-40 to T. 1087-10). Coffee was offered to him twice (T. 1097-18; T. 1099-29) and milk was sent for when he requested it (T. 1099-36 to T. 1100-4).

Petitioner who now claims his "confession" was the result of an overborne mind caused by the physical and mental pressures exerted stated the exact opposite during the course of the statement:

> "Q. What we are going to do now, on the places you indicated to us, we are going to go to the area. It will be with the same people in this room and we are going in two cars and you can point out these things you mentioned on the spot. Is that agreeable to you? A. Yes.
>
> Q. And while you were in the custody of the policemen and up at the Mahwah Police Headquarters, did anybody mistreat you or anything? A. No, sir.
>
> Q. *Everybody treat you all right?* A. *Better than I expected.*
>
> Q. I beg your pardon ? A. Better than expected.
>
> Q. Very well. It's nice to hear." (T. 1100-13 to 25) (Emphasis added.)

In his brief to the United States Court of Appeals, petitioner submitted an affidavit by his former wife. Therein, she stated that she never called an attorney since she didn't think it was necessary (A79-14 to 17). In addition, she never recalled being asked by petitioner to get a lawyer (A70a-22 to 26); did not recall anyone telling her that petitioner didn't need an attorney (A80a-38 to A81a-2); and she did not remember petitioner being ill prior to being interviewed by the police (A82a-10 to 13).

The instant case should be distinguished from *Davis* v. *North Carolina,* 384 U. S. 737 (1966). There, *Davis* was incarcerated for sixteen days on another charge and continuously questioned with regard to a murder. The poor food, the constant questioning, his claimed request and denial of counsel, a notation by police that no one was

allowed to see him, his being an impoverished negro with a third or fourth grade education and the use of a prayer by the interrogator were some of the factors comprising the "totality of circumstances" showing the involuntariness of his confession. The facts, as disclosed by the trial transcript do not bear the slightest resemblance to *Davis* v. *North Carolina, supra.* It is submitted that there is not the slightest indication that the petitioner's admission, based on the "totality of the circumstances" was coerced. Indeed, the record shows that it was the product of his own free will.

Petitioner relies principally upon *Greenwald* v. *Wisconsin,* 390 U. S. 519 (1968). In that case Greenwald, who had a ninth grade education, was suffering from high blood pressure and had been under medication for the condition at the time of his arrest shortly before 10:45 P.M. on January 20, 1965. He had last taken food and medication at 4 P.M. the same day. At police headquarters he was questioned until midnight and was not advised of his constitutional rights. He was booked and fingerprinted at 2 A.M. and taken to a cell in the city jail and he was unable to sleep because he was only given a "plank" on which to sleep. The following morning (8:30 A.M.) he was placed in a line-up and his interrogation started again at 8:45 A.M. without the benefit of breakfast, his medication or food of any kind. He refused to answer questions and when he spoke it was only to deny his guilt. After 10 A.M., the police asked Greenwald to write out a confession but he refused and requested a lawyer. The police ignored his request and at about 11 A.M. he made a series of oral admissions resulting in a full confession at 11:30 A.M. Greenwald confessed because he knew the police "weren't going to leave me alone until I did." *id.* at 517.

This Court examined the *record* in order to determine whether Greenwald's confession was voluntary. In concluding that the confession was involuntary this Court advised, "We reach this decision . . . without reference to disputed testimony taken at the pre-trial hearing." *id.* at 518.

The present case bears little resemblance to *Greenwald.* Here, petitioner was not under medication, had eaten and did not request a lawyer. Rather, petitioner was affirmatively assisting the police. The police checked out his version—a process which could just as easily have exculpated petitioner.

It is respectfully submitted that the issue of the voluntariness of petitioner's statement has been properly adjudicated by all of the courts of review.

CONCLUSION

For the reasons hereinbefore set forth, it is respectfully urged that the Petition for Certiorari be denied.

Respectfully submitted,

GUY W. CALISSI,
Bergen County Prosecutor,
Attorney for and of Counsel with Plaintiff-Respondent, The State of New Jersey, and Howard Yeager, Warden.

HAROLD N. SPRINGSTEAD,
Assistant Prosecutor,
On the Brief.